

1994

# Ruth Ann Jefferies v. Wilbur R. Jefferies : Petition for Rehearing

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca1](https://digitalcommons.law.byu.edu/byu_ca1)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Clark W. Sessions; Jay W. Butler; Campbell, Maack and Sessions; Attorneys for Appellant.  
David S. Dolowitz; Ralph E. Chamness; Cohn, Rappaport and Segal, P.C.; Attorneys for Appelle/  
Petitioner.

---

## Recommended Citation

Petition for Rehearing, *Ruth Ann Jefferies v. Wilbur R. Jefferies*, No. 940373 (Utah Court of Appeals, 1994).  
[https://digitalcommons.law.byu.edu/byu\\_ca1/6023](https://digitalcommons.law.byu.edu/byu_ca1/6023)

This Petition for Rehearing is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

IN THE UTAH COURT OF APPEALS

RUTH ANN JEFFERIES,  Plaintiff/Appellee,  v.  WILBUR R. JEFFERIES,  Defendant/Appellant.	Case No. 940373-CA  Priority No. 15
--	---

PETITION FOR REHEARING

PETITION FOR REHEARING IN THE ABOVE-ENTITLED CASE FROM A DECISION  
OF THIS COURT DATED MAY 11, 1995

UTAH COURT OF APPEALS  
BRIEF

UTAH  
COURT  
OF  
APPEALS  
CLERK  
OFFICE  
SALT LAKE CITY  
UTAH

940373

Clark W. Sessions (2914)  
Jay W. Butler (0526)  
CAMPBELL, MAACK & SESSIONS  
One Utah Center  
201 South Main Street, Thirteenth Floor  
Salt Lake City, Utah 84111-2215  
(801) 537-5555  
Attorneys for Appellant

David S. Dolowitz (0899)  
Ralph E. Chamness (6511)  
COHNE, RAPPAPORT & SEGAL P.C.  
525 East 100 South, Fifth Floor  
P.O. Box 11008  
Salt Lake City, Utah 84147-0008  
(801) 532-2666  
Attorneys for Appellee/Petitioner

**FILED**

MAY 22 1995

COURT OF APPEALS

**IN THE UTAH COURT OF APPEALS**

RUTH ANN JEFFERIES,  Plaintiff/Appellee,  v.  WILBUR R. JEFFERIES,  Defendant/Appellant.	Case No. 940373-CA  Priority No. 15
--	---

**PETITION FOR REHEARING**

PETITION FOR REHEARING IN THE ABOVE-ENTITLED CASE FROM A DECISION  
OF THIS COURT DATED MAY 11, 1995

Clark W. Sessions (2914)  
Jay W. Butler (0526)  
CAMPBELL, MAACK & SESSIONS  
One Utah Center  
201 South Main Street, Thirteenth Floor  
Salt Lake City, Utah 84111-2215  
(801) 537-5555  
Attorneys for Appellant

David S. Dolowitz (0899)  
Ralph E. Chamness (6511)  
COHNE, RAPPAPORT & SEGAL P.C.  
525 East 100 South, Fifth Floor  
P.O. Box 11008  
Salt Lake City, Utah 84147-0008  
(801) 532-2666  
Attorneys for Appellee/Petitioner

## **TABLE OF CONTENTS**

	<b>Page</b>
TABLE OF AUTHORITIES . . . . .	iii
INTRODUCTION . . . . .	1
PRIOR PROCEEDINGS . . . . .	1
ARGUMENT . . . . .	2
CONCLUSION . . . . .	5

## **TABLE OF AUTHORITIES**

### **Page**

### **CASES**

<u>Andersen v. Andersen</u> , 757 P.2d 476 (Utah App. 1988) . . . . .	3
<u>Hill v. Hill</u> , 869 P.2d 963 (Utah App. 1994) . . . . .	2
<u>Jefferies v. Jefferies</u> , Case No. 940373 (slip opinion) (Utah App. 1995) . . . . .	1, 3, 4
<u>Schaumberg v. Schaumberg</u> , 875 P.2d 598 (Utah App. 1994) . . . . .	2
<u>Shelton v. Shelton</u> , 885 P.2d 807 (Utah App. 1994) . . . . .	2

### **STATUTES**

26 U.S.C. § 401(a) (1988) . . . . .	1
Utah Code Ann. § 30-3-3 (Supp. 1993) . . . . .	2

### **OTHER AUTHORITIES**

U.R.A.P. 35 . . . . .	1
U.R.A.P. 36 . . . . .	5

## INTRODUCTION

Pursuant to Rule 35 of the Utah Rules of Appellate Procedure, Plaintiff/Appellee Ruth Ann Jefferies petitions the Court for rehearing on the single issue of whether this Court should award her fees and costs incurred in this Court.

## PRIOR PROCEEDINGS

On May 11, 1995, this Court rendered its decision in this case in an opinion entitled Jefferies v. Jefferies, Case No. 940373 (slip opinion) (Utah App. 1995) **(a copy of that opinion is attached as Addendum "A")**. In that decision, the Court affirmed the trial court's decision in part and reversed and remanded for further consideration in part. The Court held that the trial court correctly considered Mr. Jefferies' retirement plan established pursuant to 26 U.S.C. § 401(a) (1988) ("401a plan") as a marital asset when dividing the marital estate. The Court further held that the trial court was without jurisdiction to revoke gifts totaling \$145,000 to the parties' children. However, the Court in reversing that portion of the award noted that on remand the trial court could consider Mr. Jefferies' dissipation of that amount in determining an equitable division of the marital estate. Unfortunately, the Court's decision neglected to address Ms. Jefferies' request for attorneys' fees on appeal. ***See, pages 21-22 of Brief of Appellee.*** In doing so, the Court ignored its own precedent that, in domestic cases, if a party is determined by the trial court to be in need of assistance in paying attorneys' fees and is awarded fees and substantially prevails on appeals, then this Court affirms that finding and awards attorneys' fees and costs incurred in defending an appeal as well.

## ARGUMENT

This Court's prior decisions make clear that Ms. Jefferies should be awarded fees and costs incurred on appeal if she demonstrates: (1) she was awarded fees and costs below, and, (2) she substantially prevailed on appeal. Since both conditions have been satisfied in this case, the Court should grant rehearing in order to amend its opinion to include instructions that the trial court on remand should award Ms. Jefferies the fees and costs she has incurred in this appeal.

In Schaumberg v. Schaumberg, 875 P.2d 598, 604 (Utah App. 1994), this Court held:

Utah Code Ann. § 30-3-3 (Supp. 1993) grants court's discretion to award attorneys' fees in domestic cases. Trial courts have discretion to award fees so long as the award is based on findings regarding the need of the receiving spouse, the ability of the payor spouse to pay and the reasonableness of the fees. When a trial court has awarded fees at trial based on such findings, and when the receiving spouse has prevailed on appeal, we will award attorneys' fees on appeal and remand solely for the trial court to make the foregoing findings.

(Citations omitted) (emphasis added); *see also*, Shelton v. Shelton, 885 P.2d 807, 808 (Utah App. 1994) ("Because Mrs. Shelton was awarded attorney fees and costs at trial and has prevailed on appeal, we award reasonable attorney fees and costs incurred in responding to this appeal to Mrs. Shelton, and remand to the trial court for determination of the amount); Hill v. Hill, 869 P.2d 963, 967 (Utah App. 1994) ("Ms. Hill was awarded partial attorney fees by the trial court and it is conceded that she substantially prevailed on appeal. We therefore award attorney fees and costs on appeal subject to the trial court's determination on remand that Ms. Hill is in continued need of financial assistance, that the requested fees are reasonable and that Mr. Hill has the ability to pay the award").

Here the trial court specifically found:

The court further concludes that a reasonable attorneys' fees in this amount would be \$18,750 given the difficulty of the case, the issues involved in the result. The court concludes that the Plaintiff [Ms. Jefferies] has the ability to contribute to said attorneys' fees but is without sufficient funds to pay all her fees without a substantial invasion of the marital estate given her income. The court finds that Defendant [Mr. Jefferies], given his superior earnings ability, has the ability to contribute to such fees and orders that he does so in the amount of \$8,750.

***Findings of Fact and Conclusions of Law at 21 (a copy of the trial court's Findings of Fact and Conclusions of Law is attached as Addendum "B").***

This Court's opinion affirmed the trial court's ruling that Mr. Jefferies' retirement benefits held in the 401(a) plan should be considered as part of the marital estate. That ruling agreed completely with Ms. Jefferies' argument in Point I of her brief. *See, Brief of Appellee at 8-14.* This Court's ruling that the "retirement funds accumulated in a 401(a) plan during marriage are marital assets and were appropriately considered by the trial court" demonstrates that Ms. Jefferies clearly prevailed on appeal on this issue. Jefferies, slip op. at 5.

Ms. Jefferies likewise prevailed on the second issue addressed by the Court. While, this Court found held that the trial court was without jurisdiction to revoke the fund transfers made to the parties' children, the net effect on the marital estate on remand will be unchanged. That is, the amount included in the marital estate will be the same because a party who dissipates marital assets during the marriage is responsible for that amount to the other spouse upon dissolution of the marriage. As noted in the Court's opinion in this case, the Court's prior decision in Andersen v. Andersen, 757 P.2d 476, 479 (Utah App. 1988),



stands for the proposition that if a spouse dissipates assets during the marriage, the trial court should consider the amount of the dissipated assets in valuing the marital estate and in equitably dividing the estate.

Here, the Court ruled that the trial court erred in revoking these transfers. However the Court specifically stated that on remand:

[I]n making an equitable division between the spouses, the trial court, given the findings of fact in this case, may take into consideration the transfers made by Mr. Jefferies to the children at the expense of Ms. Jefferies. Although the trial court cannot reach the children's separate assets, it can hold Mr. Jefferies accountable to Ms. Jefferies for a dissipation of marital assets.

Jefferies, slip opinion at 5.

This is substantially the same position that Ms. Jefferies stated on pages 21 and 23 of her brief where she argued that this Court could have affirmed the division of marital assets on appeal on the alternate legal basis that the award could be upheld because Mr. Jefferies had "dissipated marital assets."

Here, the trial court should find, and indeed as outlined in this Court's opinion effective did find, that Mr. Jefferies dissipated the \$145,000, add that amount to the marital estate, and consider the \$145,000 when equitably dividing the property. Under this situation, the net result will be the same for Ms. Jefferies. She will receive one-half of the \$145,000. This result is basically the result of the trial court: "These transfers are void and the monies are considered to be and are ruled to be part of the marital estate." *Findings of Fact and Conclusions of Law* at 8. The end result on remand will be the same even if based on the alternate theory of dissipation as opposed to the theory of a void transfer.

Based on this Court's precedent and these facts, it is clear that Ms. Jefferies has substantially prevailed on appeal. That is, the two issues that Mr. Jefferies raised on appeal: 1) the 401(a) plan should not be considered part of the marital asset; and, 2) the \$145,000 should not be considered part of the marital asset, have both been rejected. As outlined above, as the prevailing party in domestic cases who was awarded partial attorney fees below, Ms. Jefferies is entitled to a determination and award by the trial court of reasonable attorney fees and costs incurred on appeal.

### **CONCLUSION**

Ms. Jefferies is entitled to the award of attorney fees and costs she has incurred on appeal. Accordingly, this Court should grant rehearing on that narrow issue and instruct the trial court to consider the proper amount of fees and costs to award.

### **CERTIFICATION**

Pursuant to Rule 36 of the Utah Rules of Appellate Procedure, counsel for Petitioner. Ruth Ann Jefferies certifies that this Petition is presented in good faith and not for the purposes of delay.

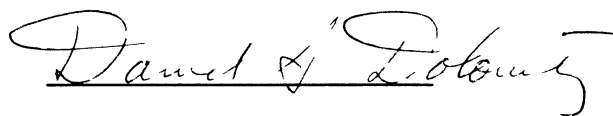
DATED this 22 day of May, 1995.

  
DAVID S. DOLOWITZ  
RALPH E. CHAMNESS  
Counsel for Appellee

CERTIFICATE OF DELIVERY

I hereby certify that I caused two true and correct copies of the foregoing  
PETITION FOR REHEARING to be mailed to the following counsel of record, postage  
prepaid this 22 day of May, 1995:

Clark W. Sessions, Esq.  
Jay W. Butler, Esq.  
CAMPBELL, MAACK AND SESSIONS  
One Utah Center  
201 South Main Street, Thirteenth Floor  
Salt Lake City, Utah 84111-2215

A handwritten signature in cursive script, reading "Daniel J. Loomis", written over a horizontal line.

(ralph\jefferies pet)

## ADDENDUM "A"

FILED

This opinion is subject to revision before  
publication in the Pacific Reporter.

MAY 11 1995

IN THE UTAH COURT OF APPEALS

COURT OF APPEALS

-----ooOoo-----

Ruth Ann Jefferies,	)	OPINION
	)	(For Publication)
Plaintiff and Appellee,	)	
	)	
v.	)	Case No. 940373-CA
	)	
Wilbur R. Jefferies,	)	
	)	F I L E D
Defendant and Appellant.	)	(May 11, 1995)

-----

Second District, Davis County  
The Honorable Rodney S. Page

Attorneys: Clark W. Sessions, Jay W. Butler and Rodney R.  
Parker, Salt Lake City, for Appellant  
David S. Dolowitz, Salt Lake City, for Appellee

-----

Before Judges Bench, Davis, and Wilkins.

WILKINS, Judge:

Wilbur Jefferies appeals the trial court's division of marital assets under a final decree of divorce. We affirm in part, and reverse and remand in part.

#### ISSUES ON APPEAL

Mr. Jefferies, as an employee of an inter-governmental agency, has participated in a retirement program that includes a plan implemented pursuant to 26 U.S.C. § 401(a) (1988) (401(a) plan). The 401(a) plan is offered and administered by the agency in lieu of participation in the federal social security system. The trial court considered the funds that had accrued during marriage in Mr. Jefferies' 401(a) plan as marital property. Mr. Jefferies appeals this determination. Whether a 401(a) plan can be considered marital property is a question of law, which we review for correctness. See State v. Pena, 869 P.2d 932, 936 (Utah 1994).

The second issue involves transfers by Mr. Jefferies of money totaling approximately \$145,000 to accounts in the names of

the couple's two children. The trial court found that the transfers were made without the knowledge of Ms. Jefferies and "as such were fraudulent and were an attempt . . . to hide assets from [her]." Therefore, the trial court voided the transfers and considered the funds to be part of the marital estate. Mr. Jefferies argues first that because the funds were transferred as gifts to the children under the Uniform Transfers to Minors Act and because the children were not before the court, the trial court lacked jurisdiction to void the transfers. This presents a question of law, which we review for correctness. Id. If the court is found to have jurisdiction over the children's accounts, Mr. Jefferies then challenges the sufficiency of the evidence leading to the trial court's conclusion that the transfers were fraudulent. Mr. Jefferies argues that the evidence of fraud is not clear and convincing. We will defer to the trial court's factual determinations unless they are clearly erroneous. Id. at 935.

#### CONSIDERATION OF 401(a) FUNDS AS MARITAL PROPERTY

Section 30-3-5(1) of the Utah Code states: "When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, debts or obligations, and parties." Utah Code Ann. § 30-3-5(1) (Supp. 1994). Construing this section regarding whether the trial court properly considered a husband's accrued retirement fund as a marital asset, the supreme court held in Englert v. Englert, 576 P.2d 1274 (Utah 1978):<sup>1</sup>

It is to be particularly noted that that language is in general terms and contains no hint of limitation. The import of our decision implementing that statute is that proceedings in regard to the family are equitable in a high degree; and that the court may take into consideration all of the pertinent circumstances. It is our opinion that the correct view under our law is that this encompasses all of the assets of every nature possessed by the parties, whenever obtained and from whatever source derived;

---

1. The relevant language of this section has not been significantly altered since the Englert case. In 1978, this section read: "When a decree of divorce is made, the court may make such orders in relation to the children, property and parties, and the maintenance of the parties and children, as may be equitable." Utah Code Ann. § 30-3-5 (1978).

and that this includes any such pension fund or insurance.

Id. at 1276 (footnote omitted).

Considering retirement benefits in a later case, the supreme court re-emphasized its position in Englert, stating: "[T]he court may take into consideration all of the pertinent circumstances. . . . If the rights to [retirement] benefits are acquired during the marriage, then the court must at least consider those benefits in making an equitable distribution of the marital assets." Woodward v. Woodward, 656 P.2d 431, 432 (Utah 1982). In addition to describing the policy of considering all assets acquired during marriage, the supreme court in Woodward described the quality of a marital asset in the context of retirement benefits. Speaking of retirement benefits as an economic resource, the court said:

Whether that resource is subject to distribution does not turn on whether the spouse can presently use or control it, or on whether the resource can be given a present dollar value. The essential criterion is whether a right to the benefit or asset has accrued in whole or in part during the marriage. To the extent that the right has so accrued it is subject to equitable distribution.

Id. at 432-33.

Accordingly, two principles are clear from the law of this state. First, all assets acquired by the parties during marriage are to be considered by the trial court when making an equitable distribution, unless the law specifically prevents the court from considering a particular asset. Second, a marital asset is defined functionally as any right that has accrued during the marriage to a present or future benefit.

The funds that accumulated in Mr. Jefferies' 401(a) plan during the marriage clearly fit the functional definition of a marital asset. Further, there is no statutory or case law that prevents the trial court from considering the 401(a) plan a marital asset. Therefore, not only was it proper for the trial

court to consider Mr. Jefferies' 401(a) plan as a marital asset, it was required.<sup>2</sup>

#### FUND TRANSFERS TO CHILDREN

Mr. Jefferies argues that the trial court was without jurisdiction to order the return of the approximately \$145,000 that had been transferred to the children under the Uniform Transfers to Minors Act, Utah Code Ann. §§ 75-5a-101 to -123 (1993). Although raised for the first time on appeal, an issue of jurisdiction may be so raised. State v. Price, 837 P.2d 578, 583-84 (Utah App. 1992).

---

2. The fact that participation in a 401(a) plan is in lieu of participation in the federal social security plan does not change the result. An asset is to be considered if it meets the functional definition of a marital asset. Funds in a 401(a) plan meet the definition, as they represent a right accrued during marriage to receive a present or future benefit, while payments into the federal social security plan do not. See Fleming v. Nestor, 363 U.S. 603, 610, 80 S. Ct. 1367, 1372 (1960) ("To engraft upon the Social Security system a concept of 'accrued property rights' would deprive it of the flexibility and boldness in adjustment to ever-changing conditions which it demands.").

In addition, Congress has enacted its own scheme of social security benefits for divorced spouses. See 42 U.S.C. § 402 (Supp. 1995). This, among other things, has led many courts to conclude that Congress has preempted state divorce laws and, therefore, social security benefits cannot be considered marital property. See, e.g., Olsen v. Olsen, 445 N.W.2d 1, 11 (N.D. 1989). Because the consideration of expected social security benefits as marital assets is not directly at issue in this case, it is unnecessary for us to reach this question.

However, we note that even absent the argument that Congress has preempted any consideration of social security benefits as marital property, under our law, social security would have no place in the consideration of marital assets in this case. Unlike the §401(a) plan here, social security benefits have no present asset value. They do not vest in any meaningful way until one meets age and other requirements imposed by federal law. Contributions toward social security cannot be withdrawn, borrowed against, assigned, given away, or otherwise treated as a present asset. Clearly, any other form of "right" or "plan" that is similarly unavailable prior to retirement would also not be a marital asset for purposes of pre-retirement division or distribution.




A transfer made pursuant to the Uniform Transfers to Minors Act "is irrevocable, and the custodial property is indefeasibly vested in the minor." Utah Code Ann. § 75-5a-112(2) (1993). It is beyond the jurisdiction of the court when dividing marital assets between the parents in a divorce proceeding to reach assets of the children. We therefore must remand this case to the trial court to divide the assets equitably without the inclusion of the children's accounts. Of course, in making an equitable division between the spouses, the trial court, given the findings of fact in this case, may take into consideration the transfers made by Mr. Jefferies to the children at the expense of Ms. Jefferies. Although the trial court cannot reach the children's separate assets, it can hold Mr. Jefferies accountable to Ms. Jefferies for a dissipation of marital assets. See Andersen v. Andersen, 757 P.2d 476, 479 (Utah App. 1988).

Because we hold that the trial court lacked jurisdiction to reach the children's accounts, we need not reach the issue of whether the elements of fraud were met by clear and convincing evidence.

#### CONCLUSION

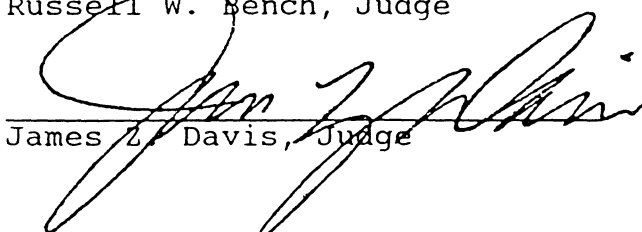
We hold that retirement funds accumulated in a 401(a) plan during marriage are marital assets and were appropriately considered by the trial court. We also hold that the trial court was without jurisdiction to reach the funds transferred by Mr. Jefferies to the children pursuant to the Uniform Transfers to Minors Act. We therefore remand this case to the trial court for an equitable division of the marital assets consistent with this opinion.

  
Michael J. Wilkins, Judge

-----

WE CONCUR:

  
Russell W. Bench, Judge

  
James L. Davis, Judge

## ADDENDUM "B"

DAVID S. DOLOWITZ (0899)  
COHNE, RAPPAPORT & SEGAL  
525 East First South  
Fifth Floor  
P.O. Box 11008  
Salt Lake City, Utah 84147-0008  
Telephone (801) 532-2666  
Attorney for Plaintiff

FILED IN DISTRICT COURT

MAY 26 11 25 AM '94

CLERK OF DISTRICT COURT

BY af  
DEPUTY CLERK

IN THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY

STATE OF UTAH

-----ooo000ooo-----  
RUTH ANN JEFFERIES, )  
 )  
Plaintiff, ) FINDINGS OF FACT AND  
 ) CONCLUSIONS OF LAW  
 )  
v. ) Civil No. 924701612DA  
 )  
WILBUR R. JEFFERIES, ) Judge: Rodney S. Page  
 )  
Defendant. )  
 )  
-----ooo000ooo-----

The above-entitled matter came before the court, the Honorable Rodney S. Page presiding for trial on the 9th and 10th day of December, 1993, with the closing argument on December 15, 1993. The Plaintiff was present in person represented by counsel, David S. Dolowitz. The Defendant was present in person represented by counsel Rodney R. Parker. The court after hearing the evidence of the parties and the arguments of counsel, ruled on certain matters from the bench at the conclusion of trial and reserved for further ruling the issues of property division, alimony and related matters. Having considered those matters and being fully advised in the premises, the court issued its ruling on the 18th day of February, 1994. Accordingly, the court makes

and enters the following as its

### **FINDINGS OF FACT**

1. The Plaintiff was a resident of Davis County, State of Utah the date this action was filed and had been so for more than three (3) months immediately prior thereto.

2. The parties are husband and wife having been married November 10, 1973.

3. Irreconcilable differences arose between the parties which made continuation of their marriage relationship impossible.

4. Two children were born as issue of this marriage, Nicole L. Jefferies, born on January 7, 1977, and Lon Mark Jefferies, born May 7, 1980. Pursuant to the stipulation of the parties, care, custody and control of the minor children of the parties should be awarded to the Defendant subject to reasonable visitation as that is defined in Utah Code Ann. Section 30-3-35. Provided, however, the relationship between the children and Plaintiff is strained. For that reason, visitation is something that will have to be worked out between Plaintiff and the children. Recognizing that problem and that the children may not be willing to go to stay over night, the court orders visitation every other Saturday and at least four hours on an evening during the off week.

5. The court finds that Mr. Jefferies has, if not purposely, at least subjectively, interfered with visitation by planning competing activities with the children on periods of time which were designated for visitation by the children with the Plaintiff,

and in that way, subjectively interfered with custody and the relationship between the Plaintiff and the children.

The court also considered the purchase of the vehicle for Nicole which encumbered the Defendant in the amount of \$400.00 per month, if not outright, at least a subtle attempt on his part to adversely influence the children against their mother.

The court further finds that the Defendant has exercised undue influence over the children in order to gain their favor by the purchase of the piano, which was entirely inappropriate given the temporary status of this matter, and the fact that the child, Nicole, was primarily concerned with the violin during this period of time. It also served to divert assets of the marriage.

6. The Defendant should be enjoined and prohibited from planning activities with the children which compete with their visitation with their mother and from otherwise interfering with visitation.

7. The Plaintiff is employed with the Utah State Tax Commission and earns an income of approximately \$2,246.00 per month and receives \$300.00 per month from a rental of a room in her home and will also receive approximately \$300.00 per month interest income from the cash awarded her in this action.

8. The Defendant is employed with Wasatch Front Regional Council and is paid a salary of \$72,000.00 annually with a gross income of approximately \$6,000.00 per month.

9. The court finds that through their employment, both parties may maintain health and accident insurance on the children. The court determines that the

Defendant should maintain the primary health and accident insurance on the minor children subject to that being available through his employment and the parties are to share any uninsured medical expenses with the Plaintiff paying one-third and the Defendant paying two-thirds. The Defendant shall pay any regular office and ordinary medical expenses. The Plaintiff is to share only in the extraordinary uninsured medical expenses.

10. By application of the Uniform Child Support Guidelines of the State of Utah, the Plaintiff should pay to the Defendant the sum of \$307.00 per month as child support for the two minor children of the parties. Child support should continue for each child until that child attains majority and graduates from high school with his/her regularly scheduled graduating class.

11. Both parties were employed prior to the marriage and acquired property which they brought into the marriage in the form of savings. The Plaintiff brought in \$17,000.00 to \$18,000.00 into the marriage and these funds were used to purchase the home on Elaine Drive and for other family expenses.

12. Approximately one month prior to the marriage of the parties, Defendant purchased a home for \$39,200.00. He used \$17,000.00 of his premarital funds as a down payment on this home. He took title to this property in his name alone. The home on 1062 East 2200 South purchased by the Defendant prior to the marriage of the parties remained in his name. The mortgage payments and upkeep were paid for from marital funds throughout the marriage of the parties. In 1981 this original home was sold for \$100,420.00 to the "Dones". As part of the purchase price, the Buyers

conveyed two lots to the Defendant and paid \$18,000.00 in cash. The Buyers also assumed the mortgage for approximately \$18,000.00. Two lots were conveyed to the Defendant in his name (Lot 28 and Lot 52 of Quail Brook) Lot 28 was valued at \$24,000.00. Lot 52 was valued at \$38,000.00. Pursuant to agreement, Defendant sold Lot 28 back to the "Dones" on June 3, 1982 for \$20,300.00 and subsequently sold Lot 52 for \$29,000.00 on March 3, 1988 to "Dubach" for \$15,000.00 down and \$14,000.00 with interest within one year. There was no evidence produced as to what happened with the proceeds of sale of the home in 1981 or the sale of two perspective lots. There is no evidence that the funds went into any surplus accounts or were traceable to certain assets so as to maintain their separate identity.

13. Prior to her marriage to the Defendant, Plaintiff received a gift of certain stock (a mutual fund) from her uncle. That stock has remained intact and in her name. The parties have done nothing with that particular asset during the course of their marriage.

14. The parties own two homes which they purchased during their marriage: 3730 South Bountiful Boulevard and 2267 Elaine Drive in Bountiful, Utah. Parties purchased the home on Elaine Drive as an investment in 1974 and used the same as a rental property until October of 1992 when the Defendant and the children moved into it. The home at 3730 South Bountiful Boulevard was purchased in 1981 and was the family's home at the time that this action was filed. The Defendant and children voluntarily moved from the home on Bountiful Boulevard before this action was filed and moved into the home on Elaine Drive. The Plaintiff has continued to reside in the

Bountiful Boulevard home and the Defendant and two children in the Elaine Drive home throughout the pendency of these proceedings. The children continue to attend the schools that they attended when they lived in the Bountiful Boulevard home.

15. The home on Bountiful Blvd. is the larger of the two homes. It has an appraised value of \$225,000.00 with a mortgage balance of \$61,394.00 leaving an equity of \$163,606.00.

16. The home on Elaine Drive was appraised at \$113,000.00. It is subject to a mortgage of \$36,880.00 leaving an equity of \$76,120.00.

17. Each of the parties have vehicles. The Plaintiff has a 1987 Subaru Wagon valued at \$4,100.00. The Defendant has a 1986 Olds Toronado valued at \$2,900.00 after deducting a sum required to repair certain body damage. The Defendant has also purchased a 1991 Subaru Sedan valued at \$11,200.00 with a loan balance of approximately \$10,600.00.

18. The parties have an airplane which they own as part of a business known as Flying Start. The parties have agreed the plane has a value of \$55,453.00. They have also agreed that the plane should be awarded to the Plaintiff subject to an obligation on it of \$15,135.00 leaving a net value on the plane of approximately \$40,318.00. There is also a spare airplane engine worth approximately \$200.00 as

parts. The question of transfer of the plane is subject to further review if the tax issues cannot be resolved. esp.

19. During the course of the marriage, the Defendant has been part of an investment group that has purchased interests in real estate. In so doing, he has acquired a one-third interest in 9.69 acres in Salt Lake County; and an 8.25 percent



interest in approximately 26 acres in Salt Lake County; and a one-fourth interest in certain property known as the Jordan Heights property in Salt Lake County. The value of the 9.69 acres is \$68,000.00 and the interest of the Defendant is \$22,966.00. The value of the 26 acres in which the Defendant has an 8.25 percent interest is \$50,200.00 and the interest of the Defendant is \$4,141.00. The value of the Jordan Heights Partnership property is \$103,400.00, and the Defendant's one-quarter interest is worth \$25,850.00.

20. The court finds the Defendant borrowed some \$32,000.00 from the Oswald Profit Sharing Plan to repay certain credit lines in connection with the video business and the Flying Start Company in 1992. To secure payment of those funds, the Defendant gave a trust deed not secured by the 9.69 acres and pledged his interest in the Jordan Heights Partnership. The note was amortized over 9 years and remains in the balance of approximately \$28,000.00 owing. Deducing the balance owing on the note from the Defendant's interest in the 9.69 acres and the Jordan Heights Partnership, leaves a net value on those properties of approximately \$20,816.00.

21. The court finds the Defendant's partners in the land ventures appear to be accommodating, allowing him to use his interest to secure loans and to have the same investment and ownership goals as the Defendant. Therefore, the court does not discount the value of these properties because of the Defendant's minority interest therein. Further the court finds these values were established by valuation for property tax purposes. The court takes judicial notice of the fact that traditionally these values are at least ten percent below fair market value. The court finds any difference in value caused by the Defendant's minority interest is more than offset by the actual value of

these properties.

22. The Defendant purchased a condominium in March, 1992. The court finds he has equity of \$5,000.00 in that condominium.

23. At the time of the separation the parties had a savings account with First Security Bank with a balance of \$10,995.00. The Plaintiff has used that account for her benefit during the pendency of this matter.

24. The Plaintiff has a 401K Plan with a value of \$12,716.00.

25. During the marriage, approximately \$145,725.00 was placed in accounts at Dean Witter Reynolds in the children's names pursuant to the Uniform Gift to Minors Act. The court has determined that those deposits were made by the Defendant without the knowledge of the Plaintiff. They were fraudulent and were an attempt by the Defendant to hide assets from the Plaintiff and transfer them to the parties' children under his control. As such they were fraudulent, not only upon the Plaintiff, but also upon the marital estate. These transfers are void and the monies are considered to be and are ruled to be part of the marital estate.

26. While the parties were married, savings accounts have been set up in the childrens' names at Shearson Lehman. These accounts have been funded primarily from earnings of the children while working in the family business and from various gifts they have received. A total of \$20,448.00 has been paid to Nicole from the business from 1988 - 1992 and there has been a total of approximately \$22,664.00 deposited in her Shearson Lehman account over that same period. Lon over the same period has been paid approximately \$20,453.00 and approximately \$23,395.00 has been

deposited in his account at Shearson Lehman during the period. Those sums which were deposited in the Shearson Lehman accounts constitute the majority of the earnings which the children have had during that period of time. There may have been some other incidental amounts which have been deposited.

The Defendant withdrew \$15,000.00 from Nicole's account supposedly in conjunction with her in the purchase of the condominium. This is a matter between the Defendant and Nicole.

A \$7,000.00 amount was withdrawn from Lon's account in 1991, and a bond was purchased at Dean Witter Reynolds. The bond which can be traced from the \$7,000.00 withdrawal is Lon's separate property.

27. The Defendant has various life insurance policies on his life which have accumulated a cash value. The beneficial life policy has a cash value of \$3,399.00. A Penn Life policy has a cash value of \$700.00 and a Principal Mutual policy has a cash value of \$659.00.

28. The Plaintiff has a life insurance with Beneficial Life with a cash value of approximately \$775.00.

29. There are life insurance policies on the children with accumulated cash values, which are the property of the children.

30. The Wasatch Front Regional Council has opted out of the social security systems, so they have a separate retirement system for their employees. The system provides for retirement by allowing the employees to invest in a 457 Plan, which is administered by the State of Utah. In addition, the Wasatch Front Regional Council

contributes a matching amount into a separate plan known as the 401(a) which is administered by Principle Financial. The retirement plans provide many advantages over social security. Under the 457 Plan, all funds accumulated are paid to the employee upon termination of employment, death, disability or unforeseen severe financial emergencies. The recipient, upon retirement can elect a lump-sum distribution, periodic payment or certain other alternatives. Under the 401(a) Plan, the employer makes a contribution on behalf of the employee, however, the employee can also make voluntary contributions. The contributions made by the employer are totally vested upon death, retirement, or termination. The employee has several options for payout including lump-sum. Under this Plan any contributions made by the employee may be withdrawn at any time, but withdrawal prior to age 59 1/2 may be subject to a ten percent penalty by the Internal Revenue Service. Under either of the Plans, all funds in the accounts may be passed to beneficiary upon property designation. The Defendant presently has \$233,412.00 in his 457 Plan and \$222,800.00 in his 401(a) Plan. All sums were accumulated during the marriage.

31. The Plaintiff has minimal state retirement; having drawn out some \$30,800.00 in January of 1981 to apply toward the purchase of the parties' home.

32. The Plaintiff has some social security eligibility.

33. In 1986 the parties opened a business known as the "Video Palace". Over the years the children have worked in the business and the earnings therefrom, were the primary source of the children's savings accounts in Shearson Lehman. The business has been operating for 7 years and has provided income to the parties. The

assets of the business, in addition to actual videos themselves, consist of certain computer equipment, a 1983 Dodge Van, and a hot air balloon. Various experts were called to evaluate the business. These valuations ranged from a low of \$30,000.00 to \$35,000.00 to a high of \$169,000.00. The method of depreciation is the crucial factor in valuation. It has a profound effect on the cash flow for valuation purposes. Too rapid a depreciation rate tends to underestimate cash flow and too slow a method, tends to over-state it. For obvious reasons, the Plaintiff's experts opted for the slowest depreciation rate and the Defendant's were the fastest. The court would find the most reasonable depreciation rate would be the one nearer the faster rate allowed by the Internal Revenue Service's regulations. The court finds that the fair market value established by the Defendant's expert of \$30,000.00, does not fairly take into consideration the history of the business and its performance over time and is more a liquidation sale price than the sale price of a going concern. From the evidence the court finds a fair market value of the business is approximately \$100,000.00. There is owing on the business an obligation in the amount of \$35,000.00 to First Security Bank. The court therefore finds the net value of the business is \$65,000.00.

34. The court does not consider the transaction between the Video Palace and Ms. Stein in 1993 to have been an arms length transaction and therefore the court has not considered that for valuation purposes.

35. The court finds that in addition to the monies paid to the children, family expenses have been paid from the business and that family expenses for other household supplies, food, transportation and entertainment have been subsidized by the

business.

36. The court finds that each of the parties had in their possession certain furniture and fixtures. The court is unable, based on the evidence, to value these items.

37. The court does find that the parlor grand piano in the Plaintiff's possession was purchased with funds given to her by her parents and is thus a gift from them. It is not part of the marital estate.

38. The court finds during the course of the marriage, the Defendant has acquired certain tools, equipment, personal property and firearms.

39. The court finds the parties have incurred debts during the course of the marriage, to-wit: a mortgage on each of the homes, a balance due and owing on the Video Palace business, a balance due and owing to the Oswald Profit Sharing Plan, the obligation due on the airplane in the business known as Flying Start, taxes owing on the Bountiful Blvd. home, the debts the Defendant has incurred since separation to Zions on the piano and car purchased for Nicole.

40. The court finds neither of these parties will be able to maintain the same standard of living that was available while they were residing together. The court finds that the Plaintiff's requested expenses are unreasonable regarding, the amount that she claimed for tuition when the court sees no real advantage to additional education, for entertainment expenses in excess of \$100.00 per month, for the children's expenses in the amount of \$200.00 per month in light of her obligation to pay child support and for vacation expenses of \$150.00 per month. Taking these into consideration, the court

finds the Plaintiff has reasonable expenses of \$2,724.00 per month.

41. The court finds the expenses claimed by the Defendant are unreasonable, that food expense for 3 people in excess of \$400.00 per month is excessive, particularly in light of the court's finding that the cost of food, household supplies, transportation and expenses are subsidized to some extent by the Video Palace as valid business expenses, the clothing expense, in excess of \$100.00 per month is also unreasonable, as is a dental and medical expense of \$150.00 per month where each of the parties carry health and dental insurance. Entertainment expenses in excess of \$100.00 per month is also unreasonable given the manner in which the business expenses are handled. The court further finds the obligation on Nicole's car is a voluntary obligation incurred by the Defendant after separation and that any sum for Nicole's car in excess of \$175.00 per month is excessive, given the circumstances of these parties. The court further finds that the deduction of \$400.00 per month for a new car for the Defendant is also excessive given the circumstances of the parties. The court further excludes the payment to Zions Bank for the piano which was purchased after the date of separation, the court considers it frivolous. The court further finds that a claim of \$150.00 per month for allowances for the children is unreasonable in light of their history of employment with the business. The mortgage payment claimed by the Defendant is in excess to the sum of \$483.00 per month (based on the award of the property made by the court). Based on the foregoing analysis, the court finds a reasonable expense for the Defendant is approximately \$4,000.00 per month.

42. The Plaintiff has a net income of \$1,588.00 per month plus \$300.00

from a rental of a room in the home. In addition, she should receive approximately \$300.00 per month in interest income from funds that the court has determined it will award to her. Even with this income, the court has found that she is without sufficient funds to meet her reasonable expenses.

43. The court has determined the Defendant has wages of \$6,000.00 per month with a net income of \$4,500.00 to \$4,700.00 per month, not including monies which he is able to receive from the business or money that he saves by subsidizing family obligations through business expenses. In addition, he will have child support from the Plaintiff in the sum of approximately \$300.00 per month.

44. The Defendant has incurred attorney's fees of \$20,653.00 based on a total of 165 hours attributed by counsel and co-counsel.

45. The court finds the Plaintiff has incurred attorney's fees of approximately \$30,000.00 based on 319 hours having been contributed by two attorneys and two paralegals. Mrs. Jefferies did much of the computations as to the graphs and business expenses offered into evidence by the Plaintiff.

46. The court finds that this case was not extremely complicated, it did have certain novel issues as to the retirement and unusual factual issues regarding the family business and its value. However, the court finds that to have spent 319 hours on this particular case is unreasonable. The court finds that given the complexity of the case, the nature of the issues, the results obtained, that 150 hours is a reasonable amount of time to be spent on this case by an attorney who is knowledgeable in the area of domestic relations as these two attorneys are. A reasonable attorney's fee would be



\$125.00 per hour.

From the foregoing Findings of Fact, the court now makes and enters the following

#### CONCLUSION OF LAW

1. The court has jurisdiction over the parties and subject matter of this action.

2. Each of the parties should be awarded a Decree of Divorce from the other on the grounds of irreconcilable differences the same to become final upon signing and entry.

3. The care, custody and control of the minor children of the parties should be awarded to the Defendant as stipulated by the parties.

4. The Defendant should be enjoined from planning competing activities for the children on dates of scheduled visitation and from otherwise interfering with visitation.

5. Visitation is something that will have to be worked out between the Plaintiff and the children. Recognizing that problem and that the children may not be willing to go overnight, the court orders visitation every other Saturday and at least four hours on an evening during the off weeks. Subject to the foregoing, the court orders standard visitation pursuant to Utah Code Ann. Section 30-3-35.

6. By application of the Uniform Child Support Guidelines of the State of Utah, the Plaintiff should pay to the Defendant the sum of \$307.00 per month as child support for the two minor children of the parties. Child support should continue for each

child until that child attains majority and graduates from high school with his/her regularly scheduled graduating class. Income withholding provision of Utah Code Ann. 62A-11-401 et. seq. shall apply.

7. The Defendant should maintain primary health insurance for the children subject to that being available through his employment. The parties are to share any uninsured medical expenses with the Plaintiff paying one-third and the Defendant paying two-thirds. The Defendant shall pay any regular office and ordinary medical expenses. The Plaintiff is to share only in the extraordinary uninsured medical expenses.

8. The Plaintiff should be awarded the home on Bountiful Boulevard subject to the mortgage thereon and the equity therein in the amount of \$163,6606.00 for the reason that the Plaintiff is presently living in the home and the Defendant voluntarily removed himself therefrom. Given the disparity of income between the parties, it is highly unlikely that Plaintiff could purchase such a home on her own. Further, by allocating this equity to the Plaintiff, it allows the Defendant to retain a greater portion of his retirement.

9. The home of the parties on Elaine Drive should be awarded to the Defendant subject to the mortgage thereon and together with the equity of approximately \$76,120.00 for the reason that is where the Defendant and the children have been residing since the separation. It appears to meet their needs. Given the Defendant's income, he has the capacity to move up if he so desires.

10. The Plaintiff should be awarded the Subaru Wagon with a value of

\$4,100.00. The Defendant should be awarded the 1986 Olds Toronado with a value of \$2,900.00 and the 1991 Subaru and debt thereon with a net value of \$600.00.

11. The Plaintiff should be awarded the airplane subject to the indebtedness thereon in the amount of \$15,135.00 for an equity of \$40,318.00. The

Defendant should be awarded the spare airplane engine. *Provided However the question of transfer of the plane is subject to further review if tax issues cannot be resolved. psp.*

12. The Defendant should be awarded his interest in the 9.69 acres and the one-fourth interest in the Jordan Heights Partnership property subject to a lien in the amount of \$28,000.00 to the Oswald Profit Sharing plan, leaving a net equity in those two parcels of \$20,816.00. The Defendant should be further awarded the 8.25 percent interest in the 26 acres with a net equity of \$4,141.00 and the condominium purchased subsequent to the separation which has an equity of \$5,000.00.

13. The Plaintiff should be awarded the savings account at First Security Bank in its original sum of \$10,995.00 for the reason that she had the use and benefit of that account during the pendency of these matters and has used certain of those sums to pay her expenses during that period.

14. The Plaintiff should be awarded the 401(K) in the amount of \$12,716.00.

15. Each of the parties should be awarded half of the sums in the Dean Witter Reynolds account in the amount of \$145,725.00 plus any accrued interest and dividends. Any income taxes incurred as a result of this division should be born equally by the parties.

16. The Plaintiff should be awarded her Beneficial Life policy with a cash

value of \$775.00.

17. The Defendant should be awarded his Beneficial Life policy with a cash value of \$3,399.00, his Penn Life policy with a cash value of \$700.00 and his Principal Mutual policy with a cash value of \$659.00.

18. The Defendant should be awarded the "Video Palace" together with the furniture and fixtures, the vehicle and the hot air balloon subject to the indebtedness thereon of \$35,000.00, leaving a net equity of \$65,000.00.

19. The court finds that the retirement program of the Defendant in the form of a 457 plan and a 401(a) plan are substantially different from social security in both the rate of return and the ownership interest which the Defendant has in the plans. That ownership interest allows him to be fully vested in all sums contributed and among other things allows him to withdraw those sums in lump sum or periodically as he may choose upon retirement, death or termination and to pass his interest to beneficiaries. All of these benefits are substantially more favorable than the usual social security benefits. For that reason, the court does not accord to these retirement benefits the same protection as is required the federal law for social security. Therefore, the court concludes that these retirement plans are joint marital property and subject to division in this proceeding.

20. The Defendant should be awarded the sums in his 457 plan in the amount of \$233,412.00 free and clear of any claim of the Plaintiff.

21. The Plaintiff should be awarded \$201,000.00 of the 401(a) plan free and clear of any claim of the Defendant and any interest or accumulation (including

additional payments) in ratio this fund is divided until actual division occurs. These should be passed to her by appropriate QDRO which should be entered by the court to implement this award after entry of the decree of divorce. The Defendant should be awarded \$21,800.00 from the 401(a) plan free and clear of any claim of the Plaintiff and any interest or accumulation (including additional payments) in ratio this fund is divided until actual division occurs.

22. The court concludes that the total value of the property previously awarded should be approximately equal.

23. Each of the parties should be awarded those items of personal property presently in their possession together with any furniture and fixtures. The court finds that they are essentially equal.

24. Each of the parties should be awarded his or her own personal property and possessions.

25. The Defendant should be awarded his tools, power equipment and sporting goods including firearms free and clear of any claim of the Plaintiff.

26. The court orders that the tools and equipment used for yard care and maintenance are to be divided equally between the parties. As an exception to the court's ruling above, the court orders that Defendant return to the Plaintiff the electric garage door opener, hose attachments to the vacuum, one of the computers, a CD player and in the event that there is more than one Sega and Nintendo player, one is to be returned to the Plaintiff.

27. The parties are ordered to divide equally any family photographs

which they may have acquired during the course of their marriage.

28. The court considers those items of furniture and fixtures used by the children to be the property of the children.

29. The court considers that the \$17,000.00 initially contributed by the Plaintiff to the marriage and the \$17,000.00 initially invested in the home purchased by the Defendant to have become marital property. The funds have been co-mingled and as such have lost their identity as separate premarital property. Therefore, the court considers them as marital property in the allocation made between the parties herein.

30. The court finds that stock given to the Plaintiff by her uncle which has remained in her name has not been co-mingled and is her sole and separate property and not subject to distribution.

31. The sums in the children's names at Shearson-Lehman and Lon's bond are awarded to the children.

32. The Plaintiff should be ordered to assume and discharge the debt due and owing on the home in Bountiful Boulevard, including any taxes and the \$15,135.00 debt due and owing on the plane and to hold the Defendant harmless thereon.

33. The Defendant should be ordered to assume and discharge the debt and obligation due on the home on Elaine Drive, the obligation due and owing on the business, the balance of any sums owing on the airplane in excess of \$15,135.00, the balance due and owing to the Oswald Profit Sharing plan and any other debts or obligations incurred during the course of the marriage or which he has incurred

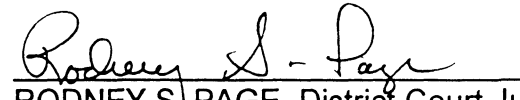
subsequent to the day of separation. The Defendant should be ordered to hold the Plaintiff harmless thereon.

34. The court finds that the Plaintiff is in need of additional support to meet her monthly expenses. Although, the court finds that the Plaintiff will receive certain interest payments from the funds awarded to her, she will still need additional support in order to meet her monthly expenses. The court concludes that in light of the Defendant's income from the Wasatch Front Regional Council, his other investments, child support he will be receiving and the benefits incident to the ownership of the business, he is in a position to provide assistance to the Plaintiff by way of support. The court therefore concludes that the Defendant should be ordered to pay to the Plaintiff the sum of \$700.00 per month as and for alimony.

35. The court further concludes that a reasonable attorney's fee in this matter would be \$18,750.00, given the difficulty of the case, the issues involved and the result. The court concludes that the Plaintiff has the ability to contribute to said attorney's fees but is without sufficient funds to pay all her fees without a substantial invasion of the marital estate given her income. The court finds that the Defendant given his superior earnings ability, has the ability to contribute to such fees and orders that he does so in the amount of \$8,750.00.

DATED this 25<sup>th</sup> day of May, 1994.

BY THE COURT:

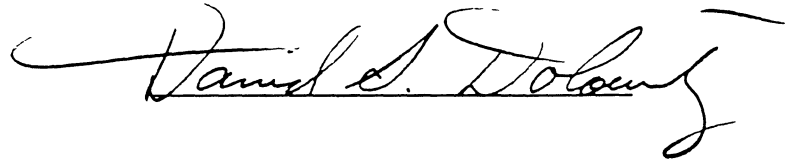
  
\_\_\_\_\_  
RODNEY S. PAGE, District Court Judge



CERTIFICATE OF SERVICE

I hereby certify that I caused to be hand-delivered this 4<sup>th</sup> day of May, 1994 a true and correct copy of the foregoing Findings of Fact and Conclusions of Law to the following individual:

Rodney R. Parker, Esq.  
SNOW, CHRISTENSEN & MARTINEAU  
10 Exchange Place, 11th Floor  
Salt Lake City, Utah 84145  
Counsel for Defendant

A handwritten signature in cursive script, appearing to read "Daniel C. Dolenz", written in black ink.

mb\DSD\Jefferies.2FOF